

1 **I. Factual and Procedural History**

2 The allegations set forth in Plaintiff's second amended
3 complaint are as follows: Plaintiff purchased two homes – located at
4 12291 and 12293 Green Mountain Road in Reno, Nevada¹ – on July 12,
5 2006, using borrowed funds. (Second Am. Compl. ¶ 33 (#109).)
6 "Plaintiff made payments according to the closing papers and the
7 prepayment coupon book sent by Soma to Soma Financial." (Id. ¶ 39.)
8 "In December 2006 Plaintiff was informed by Soma that Countrywide
9 had been assigned the right to servicing the mortgage, no
10 communication was received from Countrywide other than the coupons
11 sent sometime in December." (Id. ¶ 40.) "Beginning on or about
12 March 2007, Countrywide stated Plaintiff was not making a payment
13 large enough to cover escrow," though "Plaintiff had made the
14 payments according to the payment amount agreed upon in the closing
15 papers each and every month." (Id. ¶ 44.) On October 8, 2007,
16 Plaintiff informed Countrywide that "the astronomical increase in
17 payments, sometimes nearly double the agreed to payment with Soma
18 was beyond the agreement with Soma." (Id. ¶ 48.) Plaintiff received
19 no response. (Id.) In May 2008, Plaintiff and Countrywide
20 renegotiated Plaintiff's mortgage on one of her Reno properties –
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23 ¹ Plaintiff's complaint also references a home she owns in St.
24 Petersburg, Florida. Plaintiff, however, apparently does not continue
25 to assert any claims relating to the Florida property: "Plaintiff
26 retained counsel in Florida to stop the foreclosure. The matter was
27 withdrawn by the Defendants. Nothing is currently pending in Florida.
This case is where the entire action is being litigated. This has
been the circumstance since the beginning of this action. This is a
matter on contracts entered into in the State of Nevada." (P.'s Opp.
at 23 (#117).)

1 located at 12293 Green Mountain Street – and agreed to a monthly
2 payment of \$548.64 upon a one time payment of \$2,990.00.
3 (Id. ¶ 51.) A telephone contact from Countrywide told Plaintiff
4 that the mortgage on her other Reno property – at 12291 Green
5 Mountain Street – would also be renegotiated. (Id. ¶ 53.)
6 Plaintiff sent three letters requesting that renegotiation. (Id.)
7 On August 13, 2008, Recontrust, claiming to be the trustee of the
8 property, sent a notice of default with respect to Plaintiff's 12291
9 Green Mountain Street property. (Id. ¶ 54.) On August 1, 2008,
10 Countrywide sent Plaintiff a notice of delinquency "on purported
11 payments required on the 12293 Green Mountain property in excess of
12 \$1,500.00 per month, which was not the renegotiated modification and
13 again threatened to default and accelerate the note." (Id. ¶ 58.)
14 Countrywide refused to accept payments on Plaintiff's 12293 Green
15 Mountain Road property after November 2008. (Id. ¶ 62.) On
16 "January 12, 2009, Plaintiff received a notice sent to the wrong
17 address of her office and forwarded that stated her payment due on
18 January 1, 2009 was \$10,206.28." (Id.) Plaintiff's home at 12293
19 Green Mountain Road has been scheduled for a Trustee's sale. (Id. ¶
20 139.)

21 22 **II. Motion to Dismiss Standard**

23 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be
24 granted if the complaint fails to "state a claim to relief that is
25 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,
26 570 (2007). On a motion to dismiss, "we presum[e] that general
27 allegations embrace those specific facts that are necessary to
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1 support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555,
2 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889
3 (1990)) (alteration in original). Moreover, "[a]ll allegations of
4 material fact in the complaint are taken as true and construed in
5 the light most favorable to the non-moving party." In re Stac
6 Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996) (citation
7 omitted).

8 Although courts generally assume the facts alleged are true,
9 courts do not "assume the truth of legal conclusions merely because
10 they are cast in the form of factual allegations." W. Mining
11 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,
12 "[c]onclusory allegations and unwarranted inferences are
13 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89
14 F.3d at 1403 (citation omitted).

15 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
16 normally limited to the complaint itself. See Lee v. City of L.A.,
17 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on
18 materials outside the pleadings in making its ruling, it must treat
19 the motion to dismiss as one for summary judgment and give the non-
20 moving party an opportunity to respond. Fed. R. Civ. P. 12(d);
21 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A
22 court may, however, consider certain materials – documents attached
23 to the complaint, documents incorporated by reference in the
24 complaint, or matters of judicial notice – without converting the
25 motion to dismiss into a motion for summary judgment." Ritchie, 342
26 F.3d at 908.

1 If documents are physically attached to the complaint, then a
2 court may consider them if their "authenticity is not contested" and
3 "the plaintiff's complaint necessarily relies on them." Lee, 250
4 F.3d at 688 (citation, internal quotations, and ellipsis omitted).
5 A court may also treat certain documents as incorporated by
6 reference into the plaintiff's complaint if the complaint "refers
7 extensively to the document or the document forms the basis of the
8 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
9 adjudicative facts or matters of public record meet the requirements
10 of Fed. R. Evid. 201, a court may judicially notice them in deciding
11 a motion to dismiss. Id. at 909; see Fed. R. Evid. 201(b) ("A
12 judicially noticed fact must be one not subject to reasonable
13 dispute in that it is either (1) generally known within the
14 territorial jurisdiction of the trial court or (2) capable of
15 accurate and ready determination by resort to sources whose accuracy
16 cannot reasonably be questioned.").

17 18 III. Analysis

19 A. Transferred and Remanded Claims

20 Pursuant to a conditional transfer order issued by the United
21 States Judicial Panel on Multidistrict Litigation ("MDL"), the
22 claims in this case that are related to the formation and/or
23 operation of the MERS system were transferred to the District of
24 Arizona and assigned to the Honorable James A. Teilborg for
25 coordinated or consolidated pretrial proceedings. (In Re: Mortgage
26 Electronic Registration Systems (MERS) Litigation, MDL No. 2119,
27 Conditional Transfer Order (#125).) Claims unrelated to the

1 formation and/or operation of MERS were simultaneously remanded to
2 us. (Id.)² Thus, we will not rule on the pending motion to dismiss
3 with regard to Plaintiff's claims insofar as they are related to the
4 formation and/or operation of the MERS system.

5 B. Wrongful Foreclosure

6 The first claim for relief in Plaintiff's complaint is wrongful
7 foreclosure. This claim is under the jurisdiction of the District
8 of Arizona. (In Re: Mortgage Electronic Registration Systems (MERS)
9 Litigation, MDL No. 2119, Order at 7 (# 132).) Thus, we will not
10 rule on it.

11 C. Fraud in the Inducement

12 Plaintiff's second claim for relief alleges fraud in the
13 inducement. This claim has been bifurcated, with certain
14 allegations transferred to the District of Arizona and certain
15 allegations remanded to our jurisdiction. (Id. at 4.) Plaintiff's
16 allegations that: (1) Defendants failed to notify Plaintiff that
17 their obligations on the notes had been discharged; (2) had no
18 lawful right to foreclose on Plaintiff's properties; and (3) knew
19 that Defendants were not holders in due course, are under the
20 jurisdiction of the District of Arizona. (Id.) "These allegations
21 are based on alleged deficiencies in the notes related by the
22 operation of MERS." (Id.) We will therefore not rule on those
23 particular allegations.

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25 ² In an Order filed on March 22, 2010, Judge Teilborg of the
26 District of Arizona clarified which of Plaintiff's claims are related
27 to the formation and/or operation of MERS. (In Re: Mortgage
28 Electronic Registration Systems (MERS) Litigation, MDL No. 2119, Order
(# 132).)

1 The allegations under this claim that have been remanded and
2 are under our jurisdiction are as follows: (1) Defendants
3 "misrepresented the ability of Plaintiff to qualify for the loans";
4 (2) Defendants "concealed the true terms of the loans and the risk
5 of the transactions"; (3) "Countrywide failed and refused to further
6 advise Plaintiff of the terms of the negotiated modification of the
7 loan on 12293 Green Mountain and the effect of that modification on
8 the equity in her home." (Id. ¶¶ 80, 79 and 59.)

9 Under Nevada law, a claim for fraud in the inducement requires
10 a party to prove each of the following elements: (1) a false
11 representation; (2) knowledge or belief that the representation was
12 false (or knowledge that the defendant had an insufficient basis for
13 making the representation); (3) intent to induce the plaintiff to
14 consent to the contract's formation; (4) justifiable reliance upon
15 the misrepresentation; and (5) damage resulting from such reliance.
16 J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc., 89 P.3d 1009,
17 1017 (Nev. 2004). A claim for fraudulent concealment requires that
18 the "defendant must have been under a duty to disclose the fact to
19 the plaintiff." Nev. Power Co. v. Monsanto Co., 891 F. Supp. 1406,
20 1415 (D. Nev. 1995).

21 Plaintiff's claim that Defendants misstated her ability to
22 qualify for her loans fails to satisfy the particularity
23 requirements of Rule 9(b). Federal Rule of Civil Procedure 9(b)
24 requires that a complaint "must state with particularity the
25 circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b).
26 In a case with multiple defendants, "Rule 9(b) does not allow a
27 complaint to merely lump multiple defendants together but requires
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1 plaintiffs to differentiate their allegations when suing more than
2 one defendant and inform each defendant separately of the
3 allegations surrounding his alleged participation in the fraud.”
4 Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007) (internal
5 quotation marks and citation omitted). Plaintiff does not identify
6 which Defendant or Defendants misstated her ability to qualify for
7 her loans nor does she allege facts relating to how Defendants
8 misstated her ability to qualify for her loans.

9 The only fact alleged in the complaint that could plausibly
10 support this claim is as follows: “Plaintiff was not required to
11 fill out any applications regarding income, expenses of any other
12 information in order to qualify for the loan. The income statement
13 was completed by Soma and not signed by Plaintiff and not seen by
14 Plaintiff until documents were mailed to her well after closing . .
15 . The documents misstated Plaintiff’s income and misstated that she
16 received rent for the Florida home, which she did not, or, if any,
17 sporadically.” (Second Am. Compl. ¶ 32 (#109).) Even assuming that
18 Plaintiff’s income was misstated on certain documents, Plaintiff
19 claims she received the alleged false statement after closing. The
20 timing of Plaintiff’s receipt of the alleged false statement
21 essentially forecloses the possibility that Soma made the statement
22 with the intent to induce Plaintiff’s consent “to the contract’s
23 formation” and certainly forecloses the possibility that Plaintiff
24 justifiably relied “upon the misrepresentation” in entering into the
25 loan contract. See J.A. Jones Const. Co., 89 P.3d at 1017.

26 Plaintiff’s allegation that Defendants “concealed the true
27 terms of the loans and the risk of the transactions,” (Second Am.

1 Compl. ¶ 79 (#109)), likewise fails under Rule 9(b); it is both
2 vague and conclusory.

3 Plaintiff's claim against Countrywide also does not survive the
4 present motion to dismiss. Plaintiff claims that on June 1, 2008,
5 Plaintiff and Countrywide modified the loan on her Reno home at
6 12293 Green Mountain Road to a fixed rate loan with a monthly
7 payment of \$549.64 per month, upon a one-time payment of \$2,900.
8 (Id. ¶ 51.) "On August 1, 2008, Defendant Countrywide sent notice
9 of delinquency to Plaintiff on purported payments required on the
10 12293 Green Mountain property in excess of \$1,500.00 per month which
11 was not the renegotiated modification and again threatened to
12 default and accelerate the note." (Id. ¶ 58.) "Countrywide
13 accepted payments until November 2008 . . . and then refused to
14 accept the payments. On January 12, 2009, Plaintiff received a
15 notice sent to the wrong address of her office and forwarded that
16 stated her payment, due on January 1, 2009, was \$10,206.28." (Id.
17 ¶ 62.) Thus, Plaintiff alleges that she was billed, perhaps several
18 times, for amounts inconsistent with her modification agreement.
19 This allegation does not, however, suffice to support a claim that
20 Plaintiff was induced to enter into her modification agreement by a
21 false statement. Plaintiff's second claim for relief will therefore
22 be dismissed.

23 D. Conspiracy to Commit Fraud and Foreclosure by the Creation,
24 Operation and Use of the MERS System

25 Plaintiffs' third and fourth claims for relief allege a
26 conspiracy to commit fraud and foreclosure, respectively, by the
27 creation, operation and use of the MERS system. These claims are
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1 under the jurisdiction of the District of Arizona. (In Re: Mortgage
2 Electronic Registration Systems (MERS) Litigation, MDL No. 2119,
3 Order at 7 (# 132).) Thus, we will not rule on them.

4 E. Unjust Enrichment

5 Plaintiff's fifth claim for relief alleges unjust enrichment
6 against all Defendants. This claim has been bifurcated: allegations
7 based "on theories related to MERS" were transferred to the District
8 of Arizona and allegations based on "loan origination issues" were
9 remanded to our jurisdiction. (Id. at 6.) Under Nevada law, unjust
10 enrichment occurs when "a person has and retains a benefit which in
11 equity and good conscience belongs to another." Leasepartners Corp.
12 v. Robert L. Brooks Trust Dated November 12, 1975, 942 P.2d 182, 187
13 (Nev. 1997). An action "based on a theory of unjust enrichment is
14 not available when there is an express, written contract, because no
15 agreement can be implied when there is an express agreement." Id.
16 The doctrine of unjust enrichment thus only "applies to situations
17 where there is no legal contract but where the person sought to be
18 charged is in possession of money or property which in good
19 conscience and justice he should not retain but should deliver to
20 another [or should pay for]." Id. (quoting 66 Am. Jur. 2d
21 Restitution § 11 (1973)).

22 The basic premise of Plaintiff's claim for unjust enrichment is
23 that Plaintiff's mortgages carried inflated interest rates to which
24 she would not have agreed had she understood the true terms of the
25 loans. (Second Am. Compl. ¶ 131 (#109).) Plaintiff's mortgages are
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1 express and written contracts; Plaintiffs' fifth claim thus fails
2 and will be dismissed.

3 F. Injunctive and Declaratory Relief

4 Plaintiff's sixth and seventh claims are for injunctive and
5 declaratory relief, respectively. Injunctive and declaratory relief
6 are not independent causes of action; they are prayers for relief.
7 Therefore, Plaintiff's prayers for injunctive and declaratory relief
8 will be denied as to the claims dismissed by this Order.

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10 IV. Leave to Amend

11 Under Rule 15(a) leave to amend is to be "freely given when
12 justice so requires." FED. R. CIV. P. 15(a). In general, amendment
13 should be allowed with "extreme liberality." Owens v. Kaiser Found.
14 Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (quoting
15 Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th
16 Cir. 1990)). If factors such as undue delay, bad faith, dilatory
17 motive, undue prejudice or futility of amendment are present, leave
18 to amend may properly be denied in the district court's discretion.
19 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th
20 Cir. 2003) (discussing Foman v. Davis, 371 U.S. 178, 182 (1962)).

21 It is not within our authority to rule on Plaintiff's motion
22 for leave to amend with respect to claims related to the formation
23 and/or operation of the MERS system. Plaintiffs must seek leave
24 from Judge Teilborg to amend those claims.

25 With respect to the claims before us, Plaintiff has been put on
26 notice as to the her claims' deficiencies. Indeed, Plaintiff has

1 already amended her original complaint twice. Her second amended
2 complaint fails to state a single claim entitling her to relief. We
3 therefore conclude that granting Plaintiff further leave to amend
4 her complaint would be futile.

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6 **V. Conclusion**

7 Plaintiff's first, third and fourth claims for relief alleging
8 wrongful foreclosure, conspiracy to commit fraud and conspiracy to
9 commit wrongful foreclosure are under the jurisdiction of the
10 District of Arizona, and are therefore not addressed in this Order.
11 Plaintiff's second claim for relief fails: two of the allegations
12 lack the specificity required under Rule 9(b) and the third does not
13 allege facts that constitute fraudulent inducement. Plaintiff's
14 fifth claim for relief, alleging unjust enrichment, fails because
15 that theory of relief is not available when there is an express,
16 written contract, as in this case. Plaintiff sixth and seventh
17 claims for relief, for injunctive and declaratory relief,
18 respectively, are not independent causes of action. We will deny
19 Plaintiff leave to amend her complaint because granting further
20 leave to amend would be futile.

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22 **IT IS, THEREFORE, HEREBY ORDERED THAT** Defendants' Motion to
23 Dismiss (# 111) is **GRANTED** on the following basis: We lack
24 jurisdiction over, and thus do not rule upon, Plaintiff's claims
25 that were transferred to the District of Arizona. Plaintiff's
26 first, third and fourth claims for relief and parts of Plaintiff's

1 second and fifth claims for relief have been transferred to the
2 District of Arizona. Parts of Plaintiff's second and fifth claims
3 are under our jurisdiction. Defendants' motion is granted with
4 respect to those claims that are under our jurisdiction.

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6 **IT IS HEREBY FURTHER ORDERED THAT** Defendants' motion for
7 judicial notice (#112) is **DENIED** as moot.

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11 DATED: April 30, 2010.


UNITED STATES DISTRICT JUDGE